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Joy bin Felix v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO S-05–149–06 OF 2014
MOHD ZAWAWI SALLEH, VERNON ONG AND PRASAD ABRAHAM JJCA
8 SEPTEMBER 2015

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Criminal Law — Murder — Penal Code — s 302 — Appeal against conviction and sentence — Appellant causing death of deceased during robbery committed with accomplices — Appellant coiling seat belt around neck of deceased who already speechless and motionless — Death caused by asphyxia — Whether mens rea established under limb (d) of s 300 of the Penal Code — Whether appellant's knowledge that act likely to cause death proven — Whether knowledge may be inferred from surrounding circumstances — Whether appellant's knowledge negated by his state of panic and fear — Whether conviction save

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The appellant together with three others (PW20, PW21 and PW22 respectively) had planned to rob a taxi. The deceased's taxi was chosen and the deceased was asked to drive the appellant and his three accomplices to a secluded spot. The deceased was then attacked, tied up and moved to the passenger seat whilst PW22 took over the wheel. The appellant guarded the deceased by pointing a knife at the deceased. At one point the deceased began to shout for help and attempted to escape by kicking the front passenger door. The appellant and PW20 then repeatedly punched the deceased on his face. The deceased was speechless and motionless and bleeding on his face but was still alive. PW22 continued driving the taxi while the appellant coiled a seat belt around the deceased's neck and tied the deceased's neck with it purportedly to prevent the deceased from getting up and fighting back again. It was then found that the deceased had died. They then proceeded to a spot where the appellant dug a hole and buried the deceased's body. The appellant and his accomplices were later arrested. A post-mortem showed that the cause of death to be asphyxia due to or as a consequence of neck compression. It was concluded that a safety belt could have caused the compression over the neck resulting in asphyxia which caused the deceased's death. The appellant was charged and convicted in the High Court for murder of the deceased under s 302 of the Penal Code ('the Code') and was sentenced to death. The learned judge applied limb (d) of s 300 of the Code which provides that intention is not a necessary element and that all that is required to be proved is knowledge that the act is likely to cause death. PW20, PW21 and PW22 were charged for gang-robbery with murder under s 396 of the Code to which they pleaded guilty and were duly convicted and sentenced. The appellant appealed against

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the conviction and sentence contending that he should have been convicted for the offence of culpable homicide not amounting to murder under s 304 of the Code and not for murder under s 302 of the Code. It was argued that at the material time the appellant was in a state of panic, did not know what to do and was scared. Therefore, the appellant claimed that he did not have the knowledge that he would cause the deceased to suffocate and could cause death by such act.

Held, dismissing the appeal and affirming the decision of the High Court:

(1) The prosecution relied on exception (d) of s 300 of the Code to prove the mens rea of the appellant. The exception is based on the knowledge of the likely or probable consequences of the act and does not connote any intention at all (see para 35).

(2) On the element of knowledge, the learned judge correctly applied the principles enunciated by the Federal Court in *Abdul Aziz bin Mohamed Shariff v Public Prosecutor* [2010] 6 MLJ 759; that is, if the prosecution is proving a case under s 300(d) of the Code, what is required of them to prove is not the intention of the appellant but his knowledge that his act must in all probability cause death or the bodily injury as is likely to cause death. Knowledge in terms of mens rea in an act may not be proved by direct evidence but may be inferred from surrounding circumstances (see para 36).

(3) There was no evidence to excuse the appellant for incurring the risk of causing death to the deceased. The deceased had already been subdued after being punched in the face a number of times by the appellant and PW20. The deceased had become motionless and speechless and was bleeding in his face. There was no threat whatsoever to the appellant (see para 40).

(4) There was no appealable error in the findings of the learned judge. The findings of the learned judge that the appellant had the knowledge that his act was so imminently dangerous that in all probability when he tied the seat belt around the deceased's neck, it must cause death as such act would undoubtedly stop the breathing of the deceased was consistent with the totality of the evidence (see para 41).

[Bahasa Malaysia summary

Perayu bersama tiga yang lain (masing-masing PW20, PW21 dan PW22) telah merancang untuk merompak teksi. Teksi si mati dipilih dan si mati diminta membawa perayu dan tiga rakan subahat ke tempat yang terpencil. Si mati kemudiannya diserang, diikat dan digerakkan ke tempat duduk penumpang sementara PW22 mengambil alih tempat untuk memandu. Perayu mengawal si mati dengan mengacukan pisau kepada si mati. Pada satu masa, si mati mula menjerit untuk meminta tolong dan mencuba untuk melarikan diri dengan

menendang pintu penumpang. Perayu dan PW20 kemudiannya berulang kali menumbuk si mati di mukanya. Si mati terkedu dan kaku dan berdarah di mukanya tetapi masih bernyawa. PW22 terus memandu teksi sementara perayu mengelung tali pinggang di leher perayu dan mengikat leher si mati dengannya bertujuan untuk menghalang si mati daripada bangun dan melawan semula. Ia kemudiannya didapati bahawa si mati telah meninggal dunia. Mereka kemudiannya pergi ke kawasan di mana perayu menggali lubang dan menanam mayat si mati. Perayu dan rakan subahatnya kemudiannya ditangkap. Bedah siasat menunjukkan bahawa sebab kematian adalah asfiksia akibat atau berbangkit daripada pemampatan leher. Ia diputuskan bahawa tali pinggang keledar boleh menyebabkan pemampatan ke atas leher mengakibatkan asfiksia yang menyebabkan kematian si mati. Perayu dituduh dan disabitkan di Mahkamah Tinggi kerana membunuh si mati di bawah s 302 Kanun Keseksaan ('Kanun') dan dijatuhkan hukuman mati. Hakim yang bijaksana mengguna pakai bahagian (d) s 300 Kanun yang memperuntukkan bahawa niat bukan elemen perlu dan bahawa kesemua yang dikehendaki dibuktikan adalah pengetahuan bahawa tindakan mungkin menyebabkan kematian. PW20, PW21 dan PW22 dituduh untuk rompakan berkumpulan dengan membunuh di bawah s 396 Kanun yang mana mereka mengaku bersalah dan disabitkan dan dihukum sewajarnya. Perayu merayu terhadap sabitan dan hukuman dengan berhujah bahawa dia patut disabitkan untuk kesalahan homisid salah yang tidak menjumlahkan kepada pembunuhan di bawah s 304 Kanun dan bukan untuk pembunuhan di bawah s 302 Kanun. Ia dihujahkan bahawa pada masa material perayu dalam keadaan panik, tidak tahu apa hendak buat dan takut. Oleh itu, perayu mendakwa yang dia tidak mempunyai pengetahuan yang dia akan menyebabkan si mati sesak nafas dan boleh mengakibatkan kematian dengan tindakan sedemikian.

Diputuskan, menolak rayuan dan mengesahkan keputusan Mahkamah Tinggi:

(1) Pihak pendakwaan bergantung ke atas pengecualian (d) s 300 Kanun untuk membuktikan mens rea perayu. Pengecualian berdasarkan pengetahuan mengenai akibat kemungkinan atau berkemungkinan tindakan dan sama sekali tidak bermaksud apa-apa niat (lihat perenggan 35).

(2) Atas elemen pengetahuan, hakim yang bijaksana secara betul mengguna pakai prinsip yang ditetapkan oleh Mahkamah Persekutuan dalam kes *Abdul Aziz bin Mohamed Shariff v Public Prosecutor* [2010] 6 MLJ 759; iaitu, jika pihak pendakwaan membuktikan kes di bawah s 300(d) Kanun, apa yang dikehendaki daripada mereka untuk membuktikan bahawa ia bukan niat perayu tetapi pengetahuannya yang tindakannya mesti dalam semua kemungkinan menyebabkan kematian atau kecederaan badan yang bermungkinan menyebabkan kematian. Pengetahuan dari segi terma mens rea dalam tindakan mungkin tidak

dapat dibuktikan oleh keterangan langsung tetapi boleh disimpulkan daripada keadaan sekeliling (lihat perenggan 36).

(3) Tidak terdapat keterangan untuk memaafkan perayu kerana mengundang risiko menyebabkan kematian kepada si mati. Si mati telah lemah selepas ditumbuk di muka beberapa kali oleh perayu dan PW20. Si mati telah menjadi kaku dan terkedu dan berdarah di mukanya. Tidak terdapat apa-apa ancaman kepada perayu (lihat perenggan 40).

(4) Tidak terdapat kesilapan yang boleh dirayukan dalam dapatan hakim yang bijaksana. Dapatan hakim yang bijaksana bahawa perayu mempunyai pengetahuan bahawa tindakannya amat berbahaya di mana dalam kesemua kemungkinan apabila dia mengikat tali pinggang keledar di leher si mati, ia mesti menyebabkan kematian kerana tindakan sedemikian sudah pasti akan memberhentikan pernafasan si mati konsisten dengan keseluruhan keterangan (lihat perenggan 41).]

Notes

For cases on Penal Code, see 4(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 1644–1650.

Cases referred to

Abdul Aziz bin Mohamed Shariff v PP [2010] 6 MLJ 759; [2010] 5 CLJ 733, FC (refd)
Emperor v Mt Dhirajia AIR 1940 Allahabad 486, HC (refd)
Kenneth Fook Mun Lee v PP [2007] 2 MLJ 130; [2006] 4 CLJ 359, FC (refd)
Leow Nghee Lim v Reg [1956] 1 MLJ 128 (refd)
Nor Hamdan Mohamad v PP [2015] 5 MLRA 46, CA (refd)
PP v Mahfar bin Sairan [2000] 4 MLJ 791; [2000] 3 MLRH 42, HC (refd)
Wong Nam Loi v PP [1997] 3 MLJ 795, CA (refd)

Legislation referred to

Penal Code ss 300(d), 302, 304, 396

Appeal from: Criminal Trial No BKI-45–7/10 of 2012 (High Court, Kuala Lumpur).

Nelson W Angang (Chua Kuan E with him) (Aklee, Chua & Angang) for the appellants.
Hamdan bin Hamzah (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Vernon Ong JCA:

INTRODUCTION

[1] The appellant was convicted by the Kota Kinabalu High Court on one count of murder under s 302 of the Penal Code ('the PC') and sentenced to death. He now appeals to this court against both the conviction and sentence.

[2] The amended charge which was preferred against the appellant reads as follows:

> That you, on the 14th day of March 2012, at about 10:30 a.m., by the roadside of Jalan Padas Valley, in the District of Beaufort, in the State of Sabah, committed murder on CHIN KIN FU (M) (NRIC: 700314-12-5357) and that you have thereby committed an offence punishable under section 302 of the Penal Code (Act 574) of the Laws of Malaysia.

PROSECUTION'S CASE

[3] On 13 March 2012, the appellant together with three other individuals named Mazlan bin Anong, Bon Jovi bin Mahmud and Mohd Shah bin Faizal (PW20, PW21 and PW22 respectively) had planned to rob a taxi.

[4] On the morning of 14 March 2012, they set out to Sipitang town with the intention of robbing a known elderly Chinese taxi driver. As they did not see their intended target, it was decided to rob any other taxi; the deceased's taxi was then chosen and the deceased was asked to drive the appellant and his three accomplices to Beaufort.

[5] As the taxi approached an oil palm estate at Padas Valley, PW22 asked the deceased to drive into a junction where the appellant asked the deceased to stop the taxi at a secluded spot. When the taxi stopped, PW22 shipped out a knife, grabbed the deceased by the neck and threatened the deceased. The appellant then tied up the deceased's hands and instructed the deceased to move from the driver's seat to the front passenger seat. PW22 then took over the wheel while the appellant guarded the deceased from the rear seat pointing a knife at the deceased.

[6] After the taxi driven by PW22 for some time, it appeared that the deceased saw someone by the roadside and began to shout for help whilst at the same time attempted to escape by kicking the front passenger door, the deterring and the front mirror. In the process, the front near side door was kicked open and the taxi was nearly involved in an accident. The taxi was then brought to a standstill. The appellant began to punch the deceased's face number of times. PW20 who was seated at the rear seat came out of the taxi and

kicked the deceased's leg and punched the deceased on the face. PW20 then took over the front passenger seat holding on to the deceased's legs while the appellant pulled the deceased to the position where the deceased's body was lying on his back in the gap in the centre of the taxi with the deceased's head and upper part of his body on the rear seat. By then, the deceased was speechless and motionless and bleeding on his face but was still alive.

[7] PW22 then drove the taxi heading towards Beaufort. Enroute, the appellant took a seat belt at the rear seat of the taxi and coiled round and tied the deceased's neck with it purportedly to prevent the deceased from getting up and fighting back again. This had gone on for about twenty minutes to half an hour. It was subsequently found that the deceased had died.

[8] After the taxi stopped at a secluded place, the appellant and PW22 removed the deceased's body and placed it in the boot of the taxi. They then proceeded in the taxi to Pantai Sawagan, Kuala Penyu where the appellant dug a hole and buried the deceased's body. They also resprayed the taxi.

[9] Meanwhile, one Lee Yong Chong ('PW7') had lodged a police report informing that his son-in-law named Chin Kinn Fui, the deceased, was missing since the deceased left for work as a taxi driver driving taxi No SAA1172G on 14 March 2012 and could not be communicated by phone.

[10] On 15 March 2012, PW20 and PW22 were arrested at Sipitang with the taxi. The appellant and PW21 were arrested later based on information from PW20 and PW22.

[11] On 17 March 2012, PW20 led a police party to the place where the police recovered the deceased's body. The deceased's body was taken to the mortuary at Queen Elizabeth Hospital. A post-mortem was conducted by the pathologist Dr Jessie Hiu ('PW10') who found that the cause of death to be asphyxia due to or as a consequence of neck compression. Dr Jessie Hiu also opined that a safety belt could have caused the compression over the neck resulting in asphyxia which caused the deceased's death. Both the superior horns of the thyroid cartilage were also found to be fractured.

[12] PW20, PW21 and PW22 were charged for gang-robbery with murder under s 396 of the PC to which they had pleaded guilty and were duly convicted and sentenced.

THE HIGH COURT'S FINDINGS AT CLOSE OF PROSECUTION CASE

[13] At the close of the prosecution case, the learned judge concluded that the prosecution had proved a prima facie case of murder against the appellant as charged and called upon the appellant to enter on his defence. In making his ruling, the learned judge found that the following three ingredients on a charge under s 302 of the PC have been proved.

First ingredient — Death of the deceased

[14] Firstly, the learned judge found that there was no doubt that the deceased was dead and buried by the appellant at Pantai Sawangan, Kuala Penyu.

Second ingredient — Deceased's death caused by injuries caused by appellant

[15] Next, the deceased's death was due to injury ie the compression over the neck leading to asphyxia or that the deceased's death was caused directly by the appellant by his said act of tying a seatbelt round the deceased's neck for about twenty minutes to half an hour.

Third ingredient — Appellant had knowledge that act likely to cause death of deceased

[16] Thirdly, the learned judge found that the appellant and his accomplices had plotted to rob a taxi and had no intention to kill. The accomplices were *particeps criminis* to the offence of robbery but not to the killing of the deceased. The learned judge found the accomplices to be cogent, credible and frank as well as straight forward in giving evidence. The accomplices' evidence was substantially corroborated by the investigation teams of the police including the forensic team as to the recovery of the deceased's body and clothing buried in a dug hole at the scene and the discovery of all other exhibits as led by the accomplices and the appellant such as the utensil for digging, the burial hole, the knives (P119 and P122) used by the appellant and by PW22, the rope brought along by PW22 and used by the appellant to tie the deceased's hands.

[17] On the aforesaid facts showing that there was no intention to cause death, the learned judge applied limb (d) of s 300 of the PC which provides that intention is not a necessary element and that all that is required to be proved is knowledge that the act is likely to cause death. In other words, what is required to be proved is not the intention of the appellant but his knowledge that his act

must in all probability cause death or such bodily injury as is likely to cause death.

[18] At the time the appellant tied the seat belt around the deceased's neck, the deceased was also subdued by the appellant and PW20, both of whom had punched and kicked the deceased so much so that the deceased could no longer fight back and was no longer able to make any noise. The learned judge found that to tie a seat belt round the neck of the deceased and applied pressure on the neck as the medical evidence shows compression and fracture thereof, indicates that it was not probable at all for the purpose to subdue the deceased who was motionless and unable to fight back or to raise an alarm for help. At p 15 of the grounds of judgment, the learned judge said: 'Any sane and sensible person would have known that to apply pressure on the neck of a human would cause a stoppage of breathing resulting in death as in strangulation; and that tying a seat belt or a rope round the neck of a victim in a coil position and asserting pressure will unequivocally cause suffocation which will cause death. This act of the accused is, to this court, so imminently dangerous that in all probability when he tied a seat belt round the neck of the deceased, it must cause death as such act would undoubtedly stop the breathing of the deceased'. The learned judge also found that the appellant's act in tying the seat belt around the deceased's neck was absolutely unwarranted in the circumstances and asserting pressure which compressed the neck and fractured the superior horns of the thyroid cartilage could only be done deliberately. The appellant knew that he would cause the deceased to suffocate and could cause death by such act. As such, the learned judge concluded that the prosecution had proved the ingredient of knowledge on the appellant under limb (d) of s 300 of the PC.

THE DEFENCE CASE

[19] The appellant's narrative of the events leading up to the time the deceased had been subdued after the taxi stopped at a remote area at Padas Valley and PW22 took over the wheel of the taxi is substantially consistent with the prosecution's case.

[20] At the point when the deceased started to shout for help and attempted to escape, the appellant threw the knife he was holding and punched the deceased's face continuously for three times. When the taxi stopped, PW20 got out from the rear seat and kicked the deceased's legs and punched the deceased's face before he took the front passenger seat and held on to the deceased's legs. The appellant who remained at the rear seat dragged the deceased towards the rear seat so that the deceased's head was on the back seat and the other upper part of the body was in the middle of the taxi with both of his legs towards the front passenger seat being held by PW20.

[21] The appellant then used his arm to hold on the deceased's shoulders to prevent him from further shouting and struggling. While the taxi was heading towards Beaufort, the appellant was tired out. In a moment of panic, scared he used the seat belt to tie it around the neck of the deceased as he thought that the deceased would get up, shout and struggle again. He tied the deceased's neck for about twenty or thirty minutes. His mind was blank as to what to do. It was after the twenty to thirty minutes and upon reaching Jambatan Kota Klias that the appellant found that the deceased was no longer breathing. There was no pulse and the deceased had died. Subsequently, PW22 stopped the taxi at a deserted place and they removed the deceased's body to the boot of the car and proceed to Pantai Sawangan, Kuala Penyu where the deceased's body was buried by the appellant. The appellant said that he had no intention to kill the deceased.

THE HIGH COURT'S FINDINGS AT CLOSE OF DEFENCE CASE

[22] The learned judge found that the appellant had virtually admitted to the evidence of the prosecution as to the events that occurred. The sole explanation of the appellant besides being emphatic that he had no intention to kill the deceased is that he tied the seat belt round the deceased's neck to stop or prevent the deceased from getting up again from the position he was lying in the taxi and from further shouting, struggling or fighting back. It was a chaotic, panic and frightened situation that the deceased had allegedly been killed.

[23] The learned judge found it highly improbable that the deceased under the conditions could ever be able to get up again or put up any struggle or fight as the deceased had already been successfully subdued by the appellant and PW20. The learned judge considered the appellant's claim that he had no knowledge that tying the seat belt around the deceased's neck is so imminently dangerous that it must in all probability cause death or bodily injury as is likely to cause death. However, the learned judge also found that there is no evidence that the appellant was insane or suffering from any mental disorder which might impair his knowledge as to the nature of his act in tying a seat belt around the neck of the deceased which is imminently dangerous as it would naturally suffocate the deceased leading to death. This is clear and simple knowledge to any sane person; no special knowledge is needed to know that one may cause death or such bodily injury as is likely to cause death. This knowledge is not negative by any mental condition short of insanity (*Kenneth Fook Mun Lee v Public Prosecutor* [2007] 2 MLJ 130; [2006] 4 CLJ 359 (FC)).

[24] The learned judge evaluated the evidence of the pathologist PW10 on the cause of death of the deceased as asphyxia due to or as a consequence of compression of the neck. From the internal examination of the deceased, PW10 found bruises on the neck muscle on the front and both the superior horns of the thyroid cartilage was fractured which could be caused by the pressure on the neck and this pressure may have compressed the airway, obstructing the breathing resulting in the lack of oxygen and death. This forensic evidence was not challenged by the defence. The learned judge found that the act of the appellant is not merely tying the seat belt around the deceased's neck as a precaution to prevent the deceased from fighting back. The forensic evidence shows that the appellant applied pressure on the neck which caused the bruise and the fracture of the superior horns of the thyroid cartilage. The appellant must have known that tying a seat belt around the neck of the deceased and applying pressure is an act so imminently dangerous as the known or end result must in all probability be death or bodily injury which is likely to cause death.

[25] The learned judge also found the fact of the deceased having been subdued by the assaults of PW20 and the appellant which rendered the deceased motionless, speechless and bleeding on his face negates the defence of accidental act to justify the appellant to further tie a seat belt around the deceased's neck with pressure exerted which in all probability must cause death. There is nothing to justify the appellant's actions, in particular of tying the seat belt around the neck of the defenceless deceased and holding on with pressure for twenty to thirty minutes before releasing to discover the deceased had died. As such, the appellant intended his act and knew the consequences.

[26] In his concluding remarks, the learned judge said:

> Knowledge in terms of *mens* rea in an act may not be proved by direct evidence but may be inferred from surrounding circumstances: see *Leow Nghee Lim v Reg* [1956] 1 MLJ 128; *Wong Nam Loi v Public Prosecutor* [1997] 3 MLJ 795 (CA). Having considered all evidence, I hold from all surrounding circumstances in this case that the Accused knew that by his act of tying the seat belt round the neck of the helpless deceased and held with pressure exerted for twenty to thirty minutes that it was so imminently dangerous that it must in all probability cause the death of the deceased or such bodily injury as was likely to cause death and the Accused's such act was wholly without any excuse for incurring the risk of causing death or such injury under s 300(d) of the Penal Code. I therefore hold that the defence has failed to raise a reasonable doubt in the prosecution's case and that the prosecution had proved the charge of murder under s 302 of the Penal Code against the Accused beyond reasonable doubt.

THE APPEAL

[27] Before us, the sole ground of appeal raised was that the appellant should have been convicted for the offence of culpable homicide not amounting to murder under s 304 and not for murder under s 302 of the PC. The accomplices had pleaded guilty to a charge for gang robbery with murder under s 396 of the PC and sentenced accordingly.

[28] Learned counsel for the appellant posited that at the time the appellant tied the seat belt around the deceased's neck he did not know that he was exerting pressure on the deceased's neck. In considering the intention of the appellant, the learned judge misdirected himself on the law. The element exception (d) of s 300 of the PC requires the prosecution to prove knowledge and not intention on the part of the appellant (*Nor Hamdan Mohamad v Public Prosecutor* [2015] 5 MLRA 46 at p 50; *Public Prosecutor v Mahfar bin Sairan* [2000] 4 MLJ 791 at p 804 ; [2000] 3 MLRH 42 at p 48).

[29] Learned counsel further submitted that even though the deceased had at this time stopped shouting and struggling, the appellant still used the seat belt to tie it around the deceased's neck because he thought and believed that the deceased could and would shout and start to struggle again. The appellant has said that he has no intention of killing the deceased.

[30] It was the contention of learned counsel that if the appellant knew that his act, in the manner in which he did, was so imminently dangerous, he should not throw the knife he was holding the moment the deceased started shouting.

[31] Learned counsel criticised the learned judge for failing to take into account the background of the appellant. The evidence on record showed that the appellant's education background was very minimal and his exposure to society was very minimal.

[32] The appellant used the seat belt to tie it around the deceased's neck because he was afraid that the deceased would again struggle and shout for help. The appellant did not look at the deceased when holding the seat belt around the deceased's neck because he was busy looking at the rear window fearing that they were being followed by another taxi. He said that at that moment his mind was empty ('kosong') as he did not know what else to do as their intention was only to rob a taxi.

[33] Learned counsel submitted that the appellant was in a state of panic, scared and did not know what to do when he saw the seat belt and decided to use it on the deceased so as to prevent the deceased from shouting and struggling and nothing more. Considering the state of panic the appellant was

in, the culpable homicide did not amount to murder as there was an excuse for incurring the risk of causing death. In support of this proposition, learned counsel cited *Emperor v Mt Dhirajia* AIR 1940 Allahabad 486 at p 489 where the court said:

> The construction of this particular passage of s 300 is well settled. It is well settled that it is not murder merely to cause death by doing an act with the knowledge that it is so imminently dangerous that it must in all probability cause death. In order that an act done with such knowledge should constitute murder it is necessary that it should be committed without any excuse for incurring the risk of causing death or bodily injury. An act done with the knowledge of its consequences is not prima facie murder. It becomes murder only if it can be positively affirmed that there was no excuse.

[34] Learned counsel submitted that the learned judge had misappreciated the evidence in holding that the deceased was weak and subdued at that time and that there was no need for the appellant to tie the seat belt around the deceased's neck. The appellant did not realised that his action was so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death to the deceased as the appellant's state of mind at that moment was of sheer panic, scared and not knowing what to do and the consequences of his action.

OUR DECISION

[35] In this case, the prosecution relied on exception (d) of s 300 of the PC to prove the mens rea of the appellant. The exception is based on the knowledge of the likely or probable consequences of the act and does not connote any intention at all.

[36] On the element of knowledge, the learned judge correctly applied the principles enunciated by the Federal Court in *Abdul Aziz bin Mohamed Shariff v Public Prosecutor* [2010] 6 MLJ 759; [2010] 5 CLJ 733; that is, if the prosecution is proving a case under s 300(d) of the PC, what is required of them to prove is not the intention of the appellant but his knowledge that his act must in all probability cause death or the bodily injury as is likely to cause death (*Kenneth Fook Mun Lee v PP* [2007] 2 MLJ 130; [2006] 4 CLJ 359 (FC)). Knowledge in terms of mens rea in an act may not be proved by direct evidence but may be inferred from surrounding circumstances (*Leow Nghee Lim v Reg* [1956] 1 MLJ 128; *Wong Nam Loi v Public Prosecutor* [1997] 3 MLJ 795 (CA)).

[37] The fact that the appellant tied the seat belt around the deceased's neck is not in dispute. What is in issue is whether the appellant had the requisite knowledge as stated above. Learned counsel for the appellant argued vigorously

that at the material time the appellant was in a state of panic. He did not know what to do. He was scared. He only wanted to prevent the deceased from shouting and struggling again. Therefore, the appellant did not have the knowledge that he would cause the deceased to suffocate and could cause death by such act.

[38] Further, it was argued that in order that an act done with such knowledge should constitute murder, it is necessary that it should be committed without any excuse for incurring the risk of causing death or bodily injury. The appellant was in such a state of panic that the culpable homicide did not amount to murder as there was an excuse for incurring the risk of causing death.

[39] We have considered the facts in *Emperor v Mt Dhirajia* cited by learned counsel for the appellant in support of his argument. With respect, we do not think that the case supports the appellant's defence. In that case, a village woman had left her home with her six months old baby in her arms on account of her husband's ill treatment. After she had gone some distance from the home, she turned round and saw her husband pursuing her. She became panicky and jumped into a well nearby with the baby in her arms. The baby died, but the woman survived. On these facts, the court held that an intention to cause the death of the child could not be attributed to the woman, though she must be attributed with the knowledge that such an imminently dangerous act as jumping down the well was likely to cause the child's death. But the court held that considering the state of panic she was in the culpable homicide did not amount to murder as there was an excuse for incurring the risk of causing death.

[40] On the fact of the present appeal, we do not find any evidence to excuse the appellant for incurring the risk of causing death to the deceased. The deceased who was the victim had already been subdued after being punched in the face a number of times by the appellant and PW20. The deceased had become motionless and speechless and was bleeding in his face. There was no threat whatsoever to the appellant.

[41] We have carefully examined the appeal record and find that there is no appealable error in the findings of the learned judge. The findings of the learned judge that the appellant had the knowledge that his act is so imminently dangerous that in all probability when he tied the seat belt around the deceased's neck, it must cause death as such act would undoubtedly stop the breathing of the deceased is consistent with the totality of the evidence.

[42] For the foregoing reasons, the appeal is dismissed. The decision of the High Court is affirmed.

A *Appeal dismissed and decision of the High Court affirmed.*

Reported by Kanesh Sundrum

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